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No. 01-

IN THE

# Supreme Court of the United States

REGINALD PALMER,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

SEAN NASH
HOLLAND & KNIGHT LLP
*Attorneys for Petitioner*
55 West Monroe Street
Suite 800
Chicago, IL 60603-5144
(312) 263-3600

171056

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

5588

## QUESTIONS PRESENTED FOR REVIEW

Whether Fed. R. Crim. P. 32 and § 6A1.3 Sentencing Guidelines allow an appellate court, as a matter of due process, to make a factual finding as to drug quantity *sua sponte* and with no explanation as to its rationale for its finding, where the drug quantity estimates were based on conflicting, inconsistent and uncorroborated testimony of addict informant witnesses, and the district court made no finding as to their credibility or the reliability of the testimony.

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Petitioner, Reginald Palmer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") A, *infra*, pp. 1a-6a) is reported at 248 F.3d 569.

## STATEMENT OF JURISDICTION

The initial judgment of the court of appeals was entered on March 27, 2001. The judgment of the court of appeals on rehearing was entered on September 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RULES INVOLVED

Rule 32(c)(1) of the Federal Rules of Criminal Procedure, titled "Sentence," provides, in pertinent part:

> (1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into

> account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

Section 6A1.3(a) and (b) of the United States Sentencing Commission, *Guidelines Manual* (Nov. 2001), titled "Resolution of Disputed Factors (Policy Statement)," provides, in pertinent part:

> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
>
> (b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

## STATEMENT OF THE CASE

On April 25, 2000, defendant-appellant Reginald Palmer entered a plea of guilty for distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 860. Following the guilty plea, a Pre-Sentence Investigation Report ("PSR") was prepared, and the government relied on that report at Palmer's July 24, 2000 sentencing hearing.

The government's case at the sentencing hearing relied on the testimony of three witnesses. The first witness was Keenan Deal ("Deal"), a government informant and admitted addict. (App. B, p. 12a.) Deal made the controlled purchases which resulted in Palmer's indictment. Deal testified to these controlled purchases which amounted to 4.7 grams (App. B, p. 9a). The remainder of Deal's testimony conflicted with his statements in the PSR.

In the PSR, Deal stated that he "observed Palmer in possession of crack cocaine a total of six or seven times . . . [o]n each occasion [Palmer] was reportedly in possession of a plastic bag containing at least ten rocks. . . ." On the basis of Deal's statement, .1 grams was assigned to each of the 10 "rocks" per plastic bag, and the one gram total was multiplied by six incidents to arrive at a total of six grams. Deal never testified to this amount at the sentencing hearing. Further, in the PSR, Deal estimated that he saw an ounce of crack cocaine on these occasions during the relevant time period: May 4, 1998, May 27, 1998, and again on June 25, 1998. (PSR, p. 4, ¶¶ 7, 9; p. 5, ¶ 12.) However, at the hearing, Deal testified that on May 27 he could not estimate the quantity of drugs in Palmer's possession. (App. B, p. 11a.) Moreover, Deal estimated that Palmer possessed one half ounce on June 25, 1998 in direct contradiction of his PSR statement.

The government also relied on the testimony of Robert Lee Branscomb ("Branscomb"), an admitted heroin addict. (App. B, p. 14a-15a). In the PSR, Branscomb stated that Palmer had cooked approximately one-half ounce of crack cocaine while living with him at the Alta Sita Plaza Apartments. Based on this information, the PSR attributed to Palmer the possession of 14.17 grams of cocaine. (PSR 6) However, when Branscomb testified at the sentencing

hearing, he estimated that Palmer had "less than a quarter of an ounce," before finally admitting he was "not sure" of the specific amount. (App. B, p. 13a.)

Finally, the government relied on the testimony of Warren Griffin, who refused to testify at the hearing. Deputy Sean Newlin testified to the amounts Griffin had allegedly seen in Palmer's possession. Based on Griffin's testimony, 241 grams of cocaine was attributed to Palmer.

Upon hearing the testimony, the district court judge found that there was a "substantial rational basis for attributing more than 150 grams to the defendant."[1] In his decision, the judge particularly pointed to Griffin's testimony as reliable, but made no factual findings as to the other two witnesses. (App. B, p. 16a) After adding five other additional points and adopting the PSR's criminal history rating of V, the judge then sentenced Palmer to 475 months in prison based on the three counts alleging violations of 21 U.S.C. § 860. Although the judge clearly stated that he was not prepared to accept the government's calculation of 353.2 grams of cocaine attributed to Palmer in the PSR, he adopted the PSR without comment in the Sentencing Memorandum and Statement of Reasons. (App. C, p. 18a.)

On appeal to the Seventh Circuit, Palmer argued that the district court failed to properly scrutinize the testimony of Deal and Branscomb, both admitted drug addicts, and improperly relied upon Griffin's testimony at sentencing. The Seventh Circuit, in its March 27, 2001 order, vacated Palmer's sentence based on the fact that the lower court

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1. This drug range translates to a base offense level of 34 under the Sentencing Guidelines. U.S.S.G. § 2D1.2.

improperly considered 241 grams of crack cocaine as part of Palmer's relevant conduct in its sentence calculation. (App. A, pp. 1a-6a.) The panel then stated that the amount of drugs to which Deal and Branscomb testified was "supportable by the record," with no explanation as to its finding and despite the fact that the lower court made no factual finding as to the reliability of the amounts to which the two testified nor as to the credibility of the two men.

Palmer petitioned for re-hearing, alleging that the Seventh Circuit made a fact finding determination in contravention of its prior holdings. The petition for rehearing was denied. (App. D, p. 19a-20a.)[2]

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2. At resentencing, the inconsistencies in Deal's and Branscomb's testimony were raised again before the district court judge. (App. E, pp. 22a-23a) However, the judge, though noting the serious nature of the issues raised, stated that it was bound by the Seventh Circuit's decision. (*Id.*) In commenting on the reliability of the witnesses the lower court stated:

> I always give the example that we could take any of these people that were involved in this case . . . [i]f they came to your front door and said, I want to sell you a vacuum cleaner, they would be shot on sight because they're unreliable . . . [y]ou'd shoot 'em on sight. . . . But to say somebody is and isn't reliable is quite beside the point."

(App. E, pp. 23a-24a [resent tr. 6-7]) Continuing further, Judge Murphy stated "the personalities that are involved [in a particular case] can hardly be said to be reliable at least in the sense that that's ordinarily understood." (App E, pp. 24a-25a [resent tr. 10]). After making the above statements, the judge sentenced Palmer to 405 months in prison.

## REASONS FOR GRANTING THE WRIT

At issue is whether an appellate court should be allowed to make a factual finding necessary to support a sentencing calculation. By holding that the amounts credited to Deal's and Branscomb's testimony were "supportable" by the record, while applying a clearly erroneous standard to the district court's findings at sentencing, the Seventh Circuit has ventured into making determinations that have traditionally been the province of the trial court, without making, or having the benefit of the trial court make, a finding as to the credibility of the witnesses or the reliability of the estimates of drug quantity. Such a venture is erroneous, sets a precedent that severely hampers a defendant's due process rights, and contravenes sound and longstanding jurisprudence both in the Seventh Circuit and other circuits.

In the civil context, this Court has long admonished lower courts that, in applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must keep in mind that their function is not to decide factual issues *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Rule 32(c)(1) of the Federal Rules of Criminal Procedure requires that when defendants allege any factual inaccuracy in the presentence report, the court should either make a finding resolving the controverted matter or determine that it will not consider the controverted matter in sentencing the defendant. The requirement "protects a defendant's due process right to be sentenced on the basis of accurate information." *United States v. Chaikin*, 960 F.2d 171, 175 (D.C. Cir. 1992).

The quantity of drugs attributed to the defendant in a narcotics trafficking case is frequently the single most important determinant of the length of the defendant's sentence under the Guidelines. *United States v. Brothers*, 75 F.3d 845, 849 (3d Cir. 1996); *Untied States v. Sepulveda*, 15 F.3d 1161, 1196-98 (1st Cir. 1993), *cert. denied*, 512 U.S. 1223 (1994). Thus, it is of vital importance that the information relied upon in calculating the defendant's base offense level have "sufficient indicia of reliability to support its probable accuracy." USSG § 6A1.3(a).

## I. THE SEVENTH CIRCUIT'S DECISION DEPARTS FROM ITS PRIOR HOLDINGS

The Seventh Circuit has, on numerous occasions prior to its decision in this case, stated that "it is not this court's role to make the factual determinations necessary to support a sentencing calculation; that is a task for the district court." *United States v. Austin,* 54 F.3d 394, 405 (7th Cir. 1995), citing *United States v. Tai*, 994 F.2d 1204, 1212 (7th Cir. 1994) ("*Tai I*"); *United States v. Tai*, 41 F.3d 1170, 1175 (7th Cir. 1994) ("*Tai II*") ("this Court [will] not sift through the record to make the factual findings necessary to support the district court's determination"); *see also United States v. Sullivan*, 916 F.2d 417, 420 (7th Cir. 1990) (vacating sentence and remanding to district court where district court failed to adequately explain its reasoning for its denial of a two point reduction for acceptance of responsibility).

In *Austin*, the district court gave defendant a four level enhancement for being the organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. The court focused solely on the "five or more participants" prong for purposes of the enhancement

and made no finding in the record as to the "otherwise extensive" prong. 54 F.3d at 404. The Seventh Circuit vacated the enhancement and remanded the case. The government argued that the court could affirm on the basis of the "otherwise extensive" prong, even though the focus at sentencing was on the "five participants or more" prong, since sufficient support could be found in the record. The court refused to do so, stating that "sentencing decisions, like most fact-sensitive inquiries, are best left to the trial court." *Id.*

The present case presents the exact same scenario as in *Austin*. At sentencing, the district court judge focused on Griffin's testimony to arrive at his finding that there was over 150 grams of cocaine attributable to Palmer. That testimony was deemed unreliable by the Seventh Circuit. The court, as it did in *Austin*, should have remanded for further findings. Simply because there is "supportable" evidence in the record for 50 to 150 grams is not enough, especially where, as here, the trial court was — at that time — completely silent as to the credibility of those witnesses. *See also Sullivan*, 916 F.2d at 420 (remand necessary to determine whether two point reduction should be given where district court stated it relied on entire record for its denial of the reduction, but only articulated one factor on the record); *United States v. Patel*, 131 F.3d 1195, 1202 (7th Cir. 1997) (three point enhancement under § 3B1.1(b) vacated and remanded where district court judge was silent on its findings to support enhancement and made no reference to the PSR which contained supporting evidence).

## II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE LAW IN OTHER CIRCUITS

Generally, other circuits have remanded for factual findings where the court failed to explain its reasons for an enhancement of a defendant's base offense level (or denial of a reduction of the offense level). *See, e.g., United States v. Santiago*, 906 F.2d 867, 872 (2d Cir. 1990) (remand necessary for reconsideration of whether defendant entitled to two level reduction for acceptance of responsibility, where one ground considered was improper and district court failed to articulate another ground for denial, though record indicated that such ground existed); *United States v. Miele*, 989 F.2d 659, 667-68 (3d Cir. 1993) (findings regarding addict-informant's credibility as witness or reliability of various drug quantities were required before informant's information could be used to attribute drug quantity estimates to defendant); *United States v. Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991) (declaring that "we cannot perform the appellate function" unless the sentencing court articulates the factual basis for an adjustment); *United States v. Carter*, 219 F.3d 863, 867-68 (9th Cir. 2000) (vacation of sentence and remand for resentencing required where defendant challenged facts in PSR relevant to role enhancement and district court neither resolved the disputed issues nor indicated that they were irrelevant).

At least three circuits, however, have addressed whether an appellate court could make factual findings as to drug quantities. The Eighth Circuit addressed this very issue in *United States v. Candie*, 974 F.2d 61, 65 (8th Cir. 1992). In *Candie*, the district court announced that "there was in excess of 50 kilograms of cocaine . . . which would carry an offense level of 36." The court, however, did not explain

whether it credited the testimony of the co-conspirator. 974 F.2d at 65. A report of the court's findings as to objections to the PSR indicated that the court based its finding on the testimony of the co-conspirator. The Eighth Circuit vacated the sentence and remanded for a credibility finding regarding the co-conspirator's testimony as to drug quantity. *Id.*; *see also United States v. Randolph*, 101 F.3d 607, 609 (8th Cir. 1996), citing *Candie*.

Likewise, in *United States v. Lee*, 68 F.3d 1267 (11th Cir. 1995), the Eleventh Circuit was faced with a situation where the district court determined the drug quantity attributable to a defendant based on a co-conspirator's hearsay statements. The statements were given to a DEA agent prior to trial. 68 F.3d at 1275. The district court judge, based on the statements, found the defendant responsible for more than 15 kilograms of cocaine. The Eleventh Circuit remanded the case for specific findings as to the reasons for relying on the co-conspirator's statements. *Id.* at 1276. In so holding, the Eleventh Circuit reasoned, "specific findings on [the witnesses's] credibility are necessary before the district court can use this evidence as a basis for determining the base offense level in order to sentence [the defendant]."*Id.* (parenthesis added).

Similarly, the Fourth Circuit addressed a case where the district court did not expressly or implicitly rely on the PSR at the sentencing hearing. In *United States v. Williams*, 152 F.3d 294 (4th Cir. 1998), the district court concluded at sentencing that defendant was responsible for 13,000 kilograms of marijuana equivalency when, in fact, the police only found in defendant's possession around 58 kilograms of marijuana equivalency. At sentencing, the judge indicated that he was not adopting the PSR in its entirety. 152 F.3d at

302. Because the lower court did not adopt the PSR at the hearing and no implicit adoption could be found, the Fourth Circuit remanded for adequate findings. *Id.*

*Candie*, *Lee* and *Williams* are directly on point with the present case. Like the aforementioned cases, the district court made no determinations as to the credibility and reliability of the testimony of Deal and Branscomb whatsoever. Nor did it make any findings as to the amount of drugs attributable to Palmer in view of this evidence. The courts in all three cases had the opportunity to make the finding themselves, but refused to do so. Instead, the courts appropriately left the determination in the hands of the person in the best position to judge the credibility of witnesses, the trial judge.

The Tenth Circuit has followed the jurisprudence of the Seventh Circuit's prior holdings outlined in Section I above. In *United States v. Spears*, 197 F.3d 465, 469 (10th Cir. 1999), the district court concluded that defendant was an organizer or leader of a conspiracy under U.S.S.G. § 3B1.1(a). In so finding, the trial court discussed the sources of evidence used to reach its decision, but did not provide a factual basis for its conclusions. 197 F.3d at 469. The Tenth Circuit vacated the defendant's sentence and remanded to the district court for more specific fact finding, stating "even if the record evidence overwhelmingly supports the enhancement, appellate fact finding cannot substitute for the district court's duty to articulate clearly the reasons for the enhancement." *Id.; see also United States v. Roberts*, 14 F.3d 502, 523 (10th Cir. 1993), citing *Tai I*, 994 F.2d at 1212.

## III. THE SEVENTH CIRCUIT'S DECISION VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS TO FAIR SENTENCING

By finding that 112 grams is "supportable" by the testimony of Deal and Branscomb, two admitted drug addicts and government informants, the Seventh Circuit relegated Palmer to a base offense level of 37 and a sentence of 405 months in prison. Had Deal's and Branscomb's testimony been properly found to be inherently unreliable (as explained more fully below), Palmer would have received a base offense level of 29.[3] Thus, Palmer would have been eligible for a sentence range of 140-175 months, or approximately 19-22 years less than the sentence he actually received.

Aside from the clear seriousness of the decision as it relates to Palmer's sentence, the case sets a bad precedent. It allows the appellate court to make factual findings and credibility determinations *de novo*, while at the same time ignoring precedent establishing the need to view the testimony of informant addicts with heightened scrutiny to ensure its reliability as a matter of due process.

It is axiomatic that a defendant has a right to be sentenced on the basis of reliable information. *United States v. Lanterman*, 76 F.3d 158, 160 (7th Cir. 1996); *see also, e.g., Chaikin*, 960 F.2d at 175; *United States v. Hanono-Surujun*, 914 F.2d 15, 20 (1st Cir. 1990); *Carter*, 219 F.3d at 866. The Seventh Circuit has consistently remanded cases where inconsistent testimony is given by addict-informant witnesses

3. If the testimony were held to be unreliable, Palmer would be sentenced based on 4.7 grams as charged in the indictment, which translates to a level of 24 under the Guidelines. When added to all of his other enhancements he would be at a base offense level of 29.

and one set of such inconsistent testimony is credited over another without any reasons given as to why the chosen estimate is more reliable. *United States v. McEntire*, 153 F.3d 424, 436 (7th Cir. 1998); *United States v. Acosta*, 85 F.3d 275, 281-83 (7th Cir. 1996); *United States v. Beler*, 20 F.3d 1428 (7th Cir. 1994).

In *Beler*, the district court relied on two affidavits from a government witness and the trial testimony of a second witness to support a relevant conduct finding as to drug quantity. *Id.* at 1430. The first affidavit from the government witness reported a larger amount of drugs than the second affidavit, the latter of which the district court relied upon. *Id.* The court held that Guideline § 6A1.3(a)'s reliability standard must be rigorously applied. *Id.* at 1433. The court further noted that "although [defendant] failed to come forward with his own alternative estimate of drug quantity, he did succeed in discrediting [the witness'] estimate by pointing to [the witness'] inability to make a similar estimate of drug quantity at trial." *Id.* In addition, the witness in *Beler* was a government informant as well as a drug addict during most, if not all, of the relevant time period. In remanding the case, the court noted:

> [W]e believe the district court should have subjected any information provided by [the witness] to special scrutiny in light of his dual status as a cocaine addict and government informant. Such a heightened standard of scrutiny is consistent with the rule adopted by a number of other circuits when considering a drug quantity estimate provided by an informant who has a history of drug addiction.

*Id.* In *Beler*, the Seventh Circuit found that the district court clearly erred when it did not subject the inconsistent evidence to "the searching inquiry we must require. . . ." *Id.* at 1435.

Similarly, in *McEntire*, the Seventh Circuit followed the pronouncements set forth in *Beler* to vacate a defendant's sentence. In *McEntire*, the district court relied on witness testimony containing conclusory estimates of drug quantity and adopted the lower of four different estimates given by the witness, despite an affidavit disavowing any ability to estimate the amount of drugs the defendant received. 153 F.3d at 437. The district court did not explain its finding. *Id.* This Court held that

> the record in this case leaves us unconvinced that the district court conducted a sufficient searching inquiry into the contradictory evidence. [The witness's] testimony was uncorroborated, and the district court did not provide a rationale for believing one set of contradictory statements over another. The sentence imposed on the basis of that evidence, therefore, cannot stand.

*Id.*

Other circuits have weighed in on this issue as well. In *Miele*, 989 F.2d at 666-67, the Third Circuit vacated and remanded a drug quantity sentence based on the testimony of an addict-informant witness. The witness's testimony was strife with inconsistencies as to the quantity of drugs attributable to the defendant, to the point where the witness finally stated, "I can only theorize by looking at the quantity." *Id.*, *accord*, *United States v. Medford*, 194 F.3d 419, 424 (3d Cir. 1999). Similarly, in *United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992), the Eighth Circuit vacated and remanded a drug quantity-based sentence because the court found that it may have been based on the testimony of an addict-

informant whose memory was impaired from a history of cocaine addiction. *Id.* at 776. Finally, in *United States v. Robinson*, 904 F.2d 365 (6th Cir. 1990), *cert. denied*, 498 U.S. 946 (1990), the Sixth Circuit held that a sentencing court's drug quantity finding was clearly erroneous because it was based on the estimates of an addict-witness who admitted that she was a heavy drug user during the time period at issue, and that she was guessing at amounts. *Id.* at 371-72, *accord*, *United States v. Gibbs*, 182 F.3d 408, 444 (6th Cir. 1999).

In this case, the Seventh Circuit did exactly what it (and other appellate courts) has proscribed the lower court from doing on numerous occasions — made a factual determination of drug quantity based on conclusory, unexplained, and inconsistent testimony. A closer examination of the record shows the need for re-sentencing rather than re-calculation. For instance, the PSR attributes at least 11.31 grams to Deal's testimony from activities prior to May 5, 1998. (PSR ¶ 7). No explanation is given as to how Deal or the probation officer arrived at the amounts, nor was any explanation given by Deal at sentencing. The Seventh Circuit itself has, in past cases, been unwilling to do what it has done in this instance — rely on pure speculation to credit estimates absent a reliable evidentiary basis supporting the probation officer's assumption as to the amounts given. *See United States v. Howard*, 80 F.3d 1194, 1205 (7th Cir. 1996), citing *United States v. Henderson*, 58 F.3d 1145, 1152 (7th Cir. 1995).

Moreover, in the PSR, Branscomb is attributed to having witnessed Palmer cook up one-half ounce of crack cocaine (PSR 17). However, despite being pressed to reiterate his previous testimony, Branscomb explicitly stated at the sentencing hearing that he did not know how much crack

cocaine was cooked up.[4] (App. B, p. 13a.) At no point during the hearing did he mention the one-half ounce quantity as attributed in the PSR.

Similarly, Deal's testimony at the sentencing hearing can be shown to be unreliable. First, Deal made various bare estimates as to drug quantity, and neither the government nor the judge made any effort to explain how he arrived at these quantities. In fact, the evidence shows that his estimates are grossly miscalculated, if reliable at all. For instance, Deal stated in the PSR that he purchased from Palmer one-sixteenth portion of crack on three occasions prior to May 5, 1998, to which 1.77 grams was attributed to each transaction by the probation officer. (PSR 7.) However, on *every single occasion* in which Deal (a total of six different times by the government's calculation) purchased a one-sixteenth portion of crack which was added as relevant conduct, the amount was measured out to no more than .9 grams of crack. (PSR 8, 9, 11, 12.) Moreover, the government doubled an amount of .9 grams of crack based on a May 5, 1998 transaction. (PSR 8.) That transaction was one of the underlying offenses, for which Palmer was convicted, yet was counted again as relevant conduct. Such inconsistencies require an explanation and explicit findings by the trial judge.

More importantly, the crucial evidence in the record that belies the estimates given by Deal can be found in the June 25, 1998 tape-recorded conversation between Deal and Palmer. In the PSR, Deal is credited with having seen one ounce of crack (28.35 grams) in Palmer's possession.

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4. Further, there is no indication of when this crack was supposedly cooked up. Under the Seventh Circuit's March 27, 2001 ruling, this drug amount may well be improper for consideration similar to the quantity testified to by Warren Griffin.

However, Palmer is recorded on tape as having said that he had in his possession only five grams of crack. (App. E, p. 22a.) At that time, Palmer had no knowledge that the conversation was being recorded, and thus no motive to lie about the drug quantity. Such conflicting evidence clearly calls into question Deal's credibility and his ability to make a reliable estimate. By sentencing Palmer for the full amount as stated in the PSR, which the district court did not expressly adopt, the Seventh Circuit made a credibility determination that it has left to the district courts on numerous occasions, especially where, as here, the trial court was required as a matter of law to subject the testimony to a more searching inquiry due to the fact that the witnesses were admitted drug addicts and government informants. *McEntire*, 153 F.3d at 436; *Beler*, 20 F.3d at 1430-34.

By circumventing its own holdings, the Seventh Circuit has set up a precedent whereby the appellate court *can make a fact finding determination without a defendant's due process rights being protected.* The appellate court, by authority of this *published* decision, may now make *sua sponte* factual findings over a defendant's objections without providing specific rationales for its decisions. *See United States v. DePriest*, 6 F.3d 1201, 1213 (7th Cir. 1993) (sentence vacated where the defendant was sentenced for the entire quantity of drugs related to a conspiracy charge without a specific factual determination supporting the sentence); *see also* Fed. R. Crim. P. 32(c)(1); 18 U.S.C. § 3553(c). Moreover, the Seventh Circuit's decisions turns longstanding jurisprudence on its head. On numerous occasions, the Seventh Circuit has held that the clearly erroneous standard applies to estimates of drug quantities for sentencing purposes because "the district court, as a trier of fact, not only has the authority, but is in the best position, to determine the amount

of narcotics attributable to [defendant]." *United States v. Pitz*, 2 F.3d 723, 727-28 (7th Cir. 1993); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994); *United States v. Mancillas*, 183 F.3d 682, 701 n.22 (7th Cir. 1999). Such deference is given to the trial court because he or she has had the best opportunity to observe the verbal and non-verbal behavior of the witnesses focusing on the subjects' reactions, their facial expressions, attitudes, tones of voice, eye contact, posture and body movements, as well as confused or nervous speech patterns in contrast with merely looking at the cold pages of an appellate record. *United States v. Tolson*, 988 F.2d 1499, 1497 (7th Cir. 1993).

The rationale for the deference to the original finder of fact is not only because of the trial judge's superior position to make determinations of credibility, but also because the trial judge's major role is the determination of fact, thus creating a level of expertise through experience that the appellate court does not have. *Anderson*, 470 U.S. 574. If the Seventh Circuit's decision in this case were allowed to stand, the parties to a case on appeal would, in essence, be forced to state their case at least three more times. *Id.* at 575. The initial hearing on the merits should be the "main event," not the "tryout on the road." *Anderson*, 470 U.S. at 575, citing *Wainwright v. Sykes*, 433 U.S. 72 (1977).

In improperly conducting what amounted to a *de novo* weighing of Deal's and Branscomb's testimony in this case, the Seventh Circuit has created precedent that would allow it to find drug quantity estimates, and ultimately sentence a defendant, without the benefit of a trial court's determination of the facts. At the same time, the Seventh Circuit's decision serves to supplant the trial court's fact finding function, while potentially diverting valuable judicial resources.

*Anderson*, 470 U.S. at 575. Furthermore, the appellate court would ignore many of the verbal and non-verbal actions that are so important in determining credibility of witnesses. Evidence that is contradictory on its face is "the prototype of unreliable evidence" that the Seventh Circuit has consistently held provides an inadequate basis for calculating a defendant's base offense level under the Guidelines. *Acosta*, 85 F.3d at 283; *Beler*, 20 F.3d at 1436. For the Seventh Circuit to make a decision as to drug quantity estimates without the benefit of a hearing to resolve the inconsistent testimony or to determine the reliability of the estimates upon which it relied undermines the defendant's due process right to be sentenced based upon information with a "sufficient indicia of reliability to support its probable accuracy. USSG § 6A1.3(a); *see McEntire*, 153 F.3d at 436-37; *Beler*, 20 F.3d at 1436; *Miele*, 989 F.3d at 663-64; *Simmons*, 964 F.2d at 776; *see also Robinson*, 904 F.2d at 371-72. This is especially so where, as here, neither the district court nor the Seventh Circuit, subjected either witness's testimony to a heightened level of scrutiny as a number of circuits, including the Seventh, have held. *See Beler*, 20 F.3d at 1435; *Miele*, 989 F.2d at 666-67; *Simmons*, 964 F.2d at 776; *Robinson*, 904 F.2d at 371. By weighing evidence on a cold record, and by ignoring its own mandate to specially scrutinize testimony from addict informants, the Seventh Circuit subjects defendants, such as Palmer, to an unwarranted risk of excessive sentences based upon unreliable testimony. The Seventh Circuit's position that it may make a factual determination as to drug quantity *de novo* warrants this Court's review.

## CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that the petition for writ of certiorari should be granted.

Respectfully submitted,

SEAN NASH
HOLLAND & KNIGHT LLP
*Attorneys for Petitioner*
55 West Monroe Street
Suite 800
Chicago, IL 60603-5144
(312) 263-3600